553 602 554 A partial, but permanent, transfer of certain aspects of the parental role is the practice of fakahingoa 'to name'. The namer is usually a high ranking kinsman of either the father or mother. Aoyagi (1966: 165-167) discusses this custom and the relationships involved. Quite often the namer is the mehekitanga 'FZ', who is the highest ranking kinsman in the first ascending generation of the names. Occasionally, 553 554 unrelated persons of high status within the community may be asked to give a name such as persons with important church positions. The namer is partially responsible for the moral welfare and training of the names, and may be called upon to assist the child either through counseling or by material assistance.

429 The Tongan term that I gloss as fosterage is tauhi meaning 'to protect', or as a noun, 'guardian'. Under the arrangements of fosterage there is no alteration of the child's kinship status or inheritance rights. The jural parents retain the right to make any important decisions affecting the child's training and future. As with adopters, [593] [602] guardians are usually kinsmen, but they may be compensated materially by the jural parents for their role as protectors and providers. Examples of circumstances leading to fosterage are periods of serious illness of a parent, divorce or separation of jural parents, parents' traveling and working abroad, or education opportunities available to children by a change of residence.

597 I would like to define adoption as any putatively permanent transfer of child custody involving a transfer of primary rights of jural parenthood. Following this definition there are two types of adoption

86: Marcus E-4,5 (1972-1975) 1977 OU9 Tonga OU9

hereditary estates and routine landholding in the form of hereditary tax allotments. The noble is privileged to hold and pass on large estates, but this privilege is in fact of the same sort, albeit of a different scale, that commoners enjoy in the devolution of their much smaller estates, the tax allotments. In this sense, landholding under the law in land-scarce Tonga at whatever level, defines privilege, which is revealed in a comparison of the similarities, if not redundancy, of succession statutes applied to estates (of landed nobles) and tax allotments (of landed commoners) alike.

The major features of the succession to hereditary lands and titles as stated in Clause 111 of the Constitution and the statutes of the Land Act are: the heir must have been born in wedlock (of a formal Christian marriage). He should be the eldest male child; failing him, then any other male child (and his descendants) by seniority of age; failing him, then any female child (and her descendants) by seniority of age. Failing an heir in the direct line of succession, the title and lands revert to the line of brothers of the previous holder and their descendants in order of seniority. Failing a male heir in the line of brothers, succession proceeds through the lines of sisters.

A special stipulation pertaining to hereditary estates is that "should a female be next in succession to the title of a noble or of an hereditary chief the next male heir shall inherit the title and estates. But should such female afterwards have a legitimate issue the title and estates shall revert to the male issue of the female upon the death of the male in possession of the estate . . ." (Clause 111). Should there be no legitimate heirs to an hereditary title and estates, according to the above rules, they revert to the King for reappointment at his prerogative. No person can succeed who is insane or has been convicted of a felony since the granting of the Constitution. Nor can any person who is not of Tongan nationality succeed to land or titles.

There is a statute (Clause 40) which provides for the appointment of a Trustee by the monarch to represent and manage an hereditary title and estates which are vacant, but for which there is an heir who is still a minor (under 21 years). Trusteeship was an ambiguous issue in early succession cases because it was often not clear whether the intent of a deceased monarch (Tupou I or Tupou II) was that a person holding a title should succeed to it instead of the heir or whether he was a mere representative in the heir's minority. Such a situation was especially ambiguous when the appointee and supposed trustee was a younger brother of the previous holder, had been installed in the customary manner by the appointing monarch, and used the title and lands as if he were the proper title-holder (e.g., by attending parliament). Of course, the law was unambiguous as long as there was in fact an eldest male child heir of the previous holder. Rather, the ambiguity resided among the parties in dispute and was based on a surviving attitude, regardless of the law, that younger brother

86: Marcus E-4,5 (1972-1975) 1977 OU9 Tonga OU9

565 428 through which one could claim would multiply. Also, in such diversity, the problems of proving claims and counter-claims of legitimacy would become more difficult.

565 428 643 429 More significant were the irregularities in appointments by Tupou I and Tupou II. Certain nobles appointed by Tupou II had been younger brothers of the deceased previous holders, even though there were surviving male heirs in their minority from the direct line appointed by Tupou I. In the case of the Kaila'ā title, the present holder's paternal uncle held the title from the time of Tupou II, but did not give it up when the direct male heir came of age. Presumably, he felt that as younger brother, he was not merely a trustee but had been appointed in the traditional kava ceremony as the permanent holder of the title. Whatever was Tupou's intent, the present Kaila'ā and heir in direct line from the Constitution had no difficulty in winning the title from his uncle in the newly-established Land Court.

Trusteeship was a vaguely understood measure before the 1920's and conflicted with the traditional conception of younger brother succession as legitimate if the King chose to appoint in this way. Early cases like that of Kaila'ā demonstrated that with the existence of a male heir in the direct line, past appointments of younger brother successors could only be considered trusteeships under the present law, whatever the intent of earlier monarchs might have been.

565 428 [643] The irregular appointments of Tupou I were much more troublesome. Members from senior lines associated with a title either at the time of the formation of the nobility or in past generations could have no further claim to the title, once Tupou I chose someone from a relatively junior line to hold the title within the nobility of the new order. Although members of excluded lines could claim informal chiefly status, they had no acceptable arguments with which to initiate litigation.

[643] There were, however, at least six lines originally appointed to noble titles by Tupou I which either had no apparent previous connections by patrilineal descent with the lineage groups that had been associated with these titles in the pre-Constitutional period or the patrilineal linkage of which was thought to exist but was obscure (including the Vakalā, Mana'ia and Ivilahi titles which I investigated). Such irregular appointments were too blatant not to have surfaced in the form of succession disputes, at least in some of the cases. 565 428 671 695 Disputes concerning two of the anomalous appointments, Vakalā and Mana'ia, were the first cases heard by the Land Court. Not only was the Vakalā succession dispute one of the few to break through argumentation on the basis of points of law to a substantive consideration of customary practice, but in doing so, it raised a much broader issue about alternative ways in which Tupou I's handling of custom in the formation of the nobility could be interpreted.

423 estates or is reserved from Crown land.

Distribution of Land

Rights to tenure and a system of inheritance are pro-
[643] vided for in the Land Act of 1927. All holders of heredi-
tary estates (tofi'a) are appointed by the ruling monarch
who may grant new estates from Crown land when he finds it
423 necessary. The rules of succession to hereditary estates
428 are based on primogenture but if there are no direct lineal
descendents, the inheritance may go to brothers or sisters
and their lineal descendents. If no legitimate heir, male
or female, is available, the estate reverts to the Crown
until such time as the King grants title to a new holder.
423 If the rightful holder is less than twenty-one years of
429 age, the King shall appoint a trustee until he comes of age.
643

Government or Crown land is that not held as part of
423 hereditary estates. The government may, through the
Minister of Lands and with the consent of the Cabinet,
reserve portions of this land for roads, commons, cemeteries
schools, recreation areas, hospitals, government depart-
423 ments, or other public purposes. The King, with the consent
425 of Privy Council may also call upon any holder to give up
[643] land for public purposes. In such cases, the dispossessed
may be offered land in replacement or both land and
remuneration.

423 With respect to bush allotments (referred to as tax
allotments or 'api tukuhau in the Land Act) and town allot-

423 or death of the previous holder's widow, the allotment
428 descends, in order to his male descendents; his unmarried daughters; his brothers or their lineal descendents; his father's brothers; or their lineal descendents.

If a legal heir already holds an allotment, the allotment descends upon the next most appropriate heir. In the case of sons and grandsons of the holder, they have the option of selecting between the allotment they hold or the one available for inheritance. Allotments can also be surrended by the rightful heir by reason of old age or illness. In cases where the legal heir has not reached the [429] age of sixteen, the Minister of Land can appoint a trustee (s) until he comes of age. If no person claims the allotment, it reverts to the estate holder or the Crown. The Minister of Land may reallocate reverted allotments.

Although fragmentation is discouraged, a person may apply to the Minister to subdivide an allotment between sons, grandsons, brothers, or nephews if the original allot-
423 ment is of sufficient size. An alien can reside on an
641 estate or an allotment only by permission of the Minister.

423 Leasehold Land

427 The Land Act strictly prohibits sale of land and
[432] mortgaging of land or crops. However, there is a provision for the leasing of land and for another form of temporary
[428] tenure, the "permit". Leasehold rights can be inherited